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BY LISA KALLINA
DEPUTY

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MICHAEL J. FASBENDER, JOHN W. HERRIN, and JOHN AND JANE DOES 1 - 25, Plaintiffs, v. LEWIS AND CLARK COUNTY BOARD OF COUNTY COMMISSIONERS, DEPUTY COUNTY ATTORNEY, PAUL STAHL, and CHIEF ADMINISTRATIVE OFFICER RON ALLES, Defendants.	Cause No. BDV-2006-898 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

This matter was heard on January 22 and 30, 2007. Plaintiffs seek a preliminary injunction against the enforcement of certain interim zoning rules adopted on December 12, 2006, by the Lewis and Clark County Board of County Commissioners (hereinafter BOCC). Plaintiffs were represented by W. A. (Bill) Gallagher, and Defendants were represented by K. Paul Stahl. The parties presented

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evidence and testimony. Based upon those submissions, the Court enters the following:

FINDINGS OF FACT

The Court recognizes its duty to enter findings of fact. In this document, the factual section will be as segregated from the Court's legal conclusions as possible. However, some factual statements may be made in the conclusion portion of this document, and vice-versa. The Court hereby adopts all of its Findings of Fact as Conclusions of Law and all of its Conclusions of Law as Findings of Fact.

For several months, the BOCC had been studying a proposed zoning ordinance. At one point, a working group of concerned individuals was put together to advise the BOCC. In addition, various reports have been presented to the BOCC concerning the quality of the water in the Helena area. In particular, the Court has heard about a study known as the TMDL (Total Maximum Daily Load). This report was prepared by the Environmental Protection Agency (EPA) and the Montana Department of Environmental Quality (DEQ) in 2006. Also of interest is a document prepared by the DEQ called the Pharmaceutical Report. This report deals with the occurrence of pharmaceutical waste products found in the groundwater in the Helena valley. Both of these documents have been the topic of quite a bit of discussion, as will be noted below.

Pursuant to Section 76-2-205, MCA, the BOCC began the process to adopt certain zoning regulations and boundaries. Pursuant to Section 76-2-205, MCA, the BOCC published notice of a public hearing in the Helena *Independent Record* on August 6 and 13, 2006. At a hearing held on August 23, 2006, the BOCC passed a resolution of its intention to create a zoning district. Publication of notice of passage of the resolution of intention occurred on September 17, 2006. All parties concede

that pursuant to Section 76-2-205, MCA, the notice should have also been published the week following September 17, but that publication did not occur.

A hearing before the BOCC occurred on November 16, 2006, at which time the zoning proposal was approved. Upon hearing from Plaintiff Fasbender that the second publication of the notice of passage of the resolution of intention did not occur, the BOCC determined that the improper notice prevented the creation of the zoning regulations. On November 17, 2006, the BOCC issued a press release so stating. (Pl.'s Ex. 11.)

The BOCC then proceeded to move toward the adoption of the interim zoning regulations which are now at issue. Notice of a public hearing on the creation of an interim zoning map and zoning regulations was published in the *Independent Record* on November 23 and December 3, 2006. (Pl.'s Ex. 7.) That notice stated that a meeting would be held at 9:00 a.m. on December 12, 2006, in the City/County Building to consider adopting the interim zoning map and regulations. The notice stated that this was an emergency measure to promote the public health, safety, morals, and general welfare.

In general, the zoning regulations established lot sizes and required types of wastewater treatment. The notice went on to note that copies of the zoning ordinance and the zoning map were available at Room 404 of the City/County Building and were also available on the County's website. A map of the proposed Helena valley zoning area was also shown on the notice.

It is undisputed that the Lewis and Clark County Planning Board did not review the interim zoning regulations; no 30-day protest period was provided; and no resolution of intention to adopt those regulations was passed. It is also undisputed that the interim zoning regulations are virtually identical to the original zoning regulations

that were subject to the hearing held by the BOCC on November 16, 2006. The BOCC adopted the subject zoning regulations on December 12, 2006, and this lawsuit was filed on December 18, 2006.

Plaintiffs are both landowners and land developers residing in Lewis and Clark County. Both Plaintiffs Fasbender and Herrin have been actively involved in the long process discussing the current zoning regulations. Both Plaintiffs have appeared at numerous hearings and presented their points of view, both in writing and by oral testimony. The named-Plaintiffs seek a preliminary injunction preventing the enforcement of the interim zoning regulations until a trial of this matter.

Both Plaintiffs indicate that they own property in Lewis and Clark County that they intend to develop. They feel that the interim zoning regulations were improperly adopted for a number of reasons that will be discussed in this document. They both feel that they will be irreparably injured should a preliminary injunction not issue. Both are concerned that if these zoning regulations are not stayed, but eventually found to be invalid, that, in the intervening time between those two events, the "regulatory landscape" will markedly change. Although the named-Plaintiffs indicated that it would be hard to calculate their damages, both testified at the hearing in this matter and calculated what their damages might be. (See e.g. Pl.'s Exs. 15, 19.)

Leading up to the hearing on December 12, 2006, Plaintiffs and others contacted various County officials to ask about the nature of the emergency. Plaintiffs' Exhibit 1 is an e-mail from Plaintiff Fasbender to the BOCC asking about the nature of the emergency. Exhibit 2 is a letter from County Commissioner Varone to the County Attorney, forwarding Exhibit 1. Exhibit 3 is another e-mail from Plaintiff Fasbender to the BOCC, wherein it was stated:

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> The IR yesterday reported that Kathy Moore would be making a presentation at tomorrow's meeting on interim zoning and the potential water quality emergency.
>
> If Ms. Moore is going to present information and data stating that we have a water quality emergency in the Valley, I (and others) would like the opportunity to review this information prior to the Commission meeting so that we can comment on it.

Exhibit 4 is a December 11, 2006, letter from Plaintiffs' attorney requesting information as to the matters that constitute the emergency. Plaintiffs' Exhibit 8 is an e-mail from an individual named Liane Taylor, dated December 4, 2006. In that letter, Taylor also requested information concerning the emergency. The BOCC did not respond to these inquiries.

There is no question that the Plaintiffs and their supporters (such as Ms. Taylor) were well aware of the zoning ordinance in question since they had been involved with it for some time. Also clear from reading the aforementioned e-mails was that the named-Plaintiffs and their supporters were aware that the issue was a potential water quality emergency. (Pl.'s Ex. 3.)

At the hearing, the BOCC limited the comment of public members to three minutes. Also, at the hearing, the Plaintiffs and others requested that the record be kept open so that they might be able to submit written responses to the County's written position. This request was denied. Written materials supporting Plaintiffs' position were submitted to the BOCC at the hearing.

The hearing lasted from approximately 9:00 a.m. until noon. The first witness to testify was Kathy Moore, the administrator of the County's Water Quality Protection District. Moore presented an oral statement to the BOCC, which the Court has reviewed. (Pl.'s Ex. 6.) Moore's written report was submitted at the commencement of the hearing, at about 9:00 a.m. on December 12, 2006. (Def.'s Ex. H.) No one, including the BOCC or the Plaintiffs, had seen Exhibit H prior to 9:00

a.m. on December 12. Moore indicated that her report was a distillation of approximately 13 documents that were on the public record and had been mentioned in various hearings prior to the hearing on December 12. In particular, Moore referenced the TMDL study and the Pharmaceutical Report. According to Moore, these various reports were available on the County website and at the County offices.

Moore testified that, before preparing her report, she did not feel there was an emergency concerning the groundwater in the Helena valley. However, Moore testified at the trial of this matter that, after completing her report, she was of the opinion that an emergency existed. Moore would not classify the situation as a crisis, but would call it an emergency.

At approximately noon on December 12, 2006, the BOCC voted to approve the zoning district and regulations. According to County Commissioner Murray, the BOCC did review the written materials that were submitted on behalf of the Plaintiffs, and it was determined that the written materials submitted were, in essence, a rehash of materials that had been presented to the BOCC in prior hearings. Moore's report was placed on the County website the day after the December 12 hearing.

At the hearing before this Court, County Administrator Ron Alles testified that he considered the groundwater situation in the Helena valley to be an emergency. Alles also testified that it was he who directed Moore to prepare her report. (Ex. H.)

Plaintiffs, at this stage of the proceedings, are presenting three general arguments supporting their contention that a preliminary injunction should issue. First, Plaintiffs contend that the first zoning effort which culminated in a public hearing on or about November 16, 2006, was subject to a successful protest by an

appropriate number of landowners in Lewis and Clark County, which prevents further zoning by the County for a year. Next, Plaintiffs contend that improper statutory procedures were followed in the adoption of the interim zoning regulations, and, finally, that the zoning regulations were adopted in violation of the Plaintiffs' constitutional rights.

CONCLUSIONS OF LAW

This Court has jurisdiction of this matter.

Preliminary Injunction

A preliminary injunction may be granted in the following cases:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual; . . .

Section 27-19-201, MCA. In this case, the parties agree that subsections (4) and (5) of the statute do not apply.

The Montana Supreme Court has interpreted when a district court can issue a preliminary injunction:

> We have previously stated that the subsections of this statute are disjunctive, 'meaning that findings that satisfy one subsection are sufficient.' Stark v. Borner (1987), 226 Mont. 356, 359, 735 P.2d 314, 317. Consequently, only one subsection need be met for an injunction to issue. *See* Stark, 226 Mont. at 359-60, 735 P.2d at 317.
> 'An applicant for a preliminary injunction must establish a prima facie case or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.' Porter v. K & S Partnership (1981), 192 Mont. 175, 181, 627 P.2d 836, 839. In deciding whether an applicant has established a prima facie case, a court should determine whether a sufficient case has been made out to warrant

> the preservation of the property or rights in status quo until trial, without expressing a final opinion as to such rights. *See* Fox Farm Estates Landowners Ass'n v. Kreisch (1997), 285 Mont. 264, 268, 947 P.2d 79, 82. 'Status quo' has been defined as 'the last actual, peaceable, noncontested condition which preceded the pending controversy.' Porter, 192 Mont. at 181, 627 P.2d at 839 *(quotation and citations omitted)*.

Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs, 2000 MT 147, ¶¶ 27, 28, 300 Mont. 66, ¶¶ 27, 28, 2 P.3d 825, ¶¶ 27, 28. Further, when considering whether to issue a preliminary injunction, it is the court's duty to balance the equities and minimize the injury or damage to all parties to the controversy. Porter, 192 Mont. at 182, 627 P.2d at 840. In determining whether to issue a preliminary injunction, a court should not express a final opinion as to the merits of the case, further:

> [a]n applicant who could show that he is entitled to final judgment on the merits still might not be entitled to a preliminary injunction. As stated in the above-cited cases, the limited function of a preliminary injunction is to preserve the status quo and to minimize the harm to all parties pending full trial. If a preliminary injunction will not accomplish those purposes, then it should not issue. . . .

Porter, 192 Mont. at 183, 627 P.2d at 840. Further, injunctive relief is not to be granted where an action for monetary damages will afford an adequate remedy. *See* Shammel v. Canyon Res. Corp., 2003 MT 372, ¶ 17, 319 Mont. 132, ¶ 17, 82 P.3d 912, ¶ 17.

The supreme court has established a four-part test to determine whether a preliminary injunction should issue when a party's monetary judgment may be made ineffectual by the actions of the adverse party, thereby irreparably injuring an applicant. The test is:

> (1) the likelihood that the movant will succeed on the merits of the action;
> (2) the likelihood that the movant will suffer irreparable injury absent the issuance of a preliminary injunction;
> (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party (a

balancing of the equities); and

(4) the injunction, if issued, would not be adverse to the public interest.

Shammel, ¶ 17, *citing* Van Loan v. Van Loan, 271 Mont. 176, 181-82, 895 P.2d 614, 617 (1995).

Agricultural Land Dispute

As noted in the Findings section of this document, the BOCC was initially establishing a zoning district and zoning regulations in a "non-emergency" procedure. The BOCC was utilizing Section 76-2-205, MCA. That statute requires that notice of a public hearing on a proposed zoning district and regulations be published once a week for two weeks. Then, at the hearing, the commissioners may pass a resolution of the intention to create the district and adopt the regulations. Thereafter, the commissioners are to publish notice of passage of the resolution once a week for two weeks. Pursuant to Section 76-2-205(5), MCA, for 30 days after the first publication of this latter notice, the commissioners will receive written protest to the creation of the district or to the regulations. Pursuant to Section 76-2-205(6), MCA, if freeholders representing 50 percent of the titled property ownership whose property is taxed for agricultural purposes under Section 15-7-202, MCA, have protested the establishment of the district, the commissioners may not adopt the resolution, and further, a zoning resolution may not be proposed for the district for a period of one year.

In the initial zoning attempt pursuant to Section 76-2-205, MCA, the BOCC determined that there was an unsuccessful protest attempt. Plaintiffs contend that the BOCC illegally manipulated the amount of property that is taxed for agricultural purposes under Section 15-7-202, MCA. The BOCC, on the other hand,

contends that its calculation of the protest was appropriate. Further, the BOCC suggests that its failure to properly publish notice under Section 76-2-205, MCA, renders the entire first zoning process invalid, and that the Court need not determine whether the protest was successful or not.

At this stage, it is somewhat interesting to note that Plaintiff Fasbender originally complained that since the second notice was not given, the County's initial zoning attempt was invalid. Now, however, Plaintiffs are contending that the missing second notice is not material and is a harmless error.

The Montana Supreme Court has held that the proper issue facing a district court in a matter such as this is whether the board of county commissioners substantially complied with the procedural steps for creating zoning districts. Petty v. Flathead County Bd. of Comm'rs, 231 Mont. 428, 431, 754 P.2d 496, 499 (1980). It is interesting to note that in Petty, the supreme court noted that the plaintiff failed to point out any specific error in the procedural requirements. Petty, at 431, 754 P.2d 498. At page 5 of Plaintiffs' post-hearing brief, it is suggested that the issue in Petty was improper notice. However, that was not an issue in Petty, since Petty failed to point out any specific procedural error.

The supreme court has also held that where the state zoning enabling act prescribes certain procedural steps, that procedure is regarded as mandatory and a failure to comply with such requirements will render a zoning ordinance invalid. Dover Ranch v. County of Yellowstone, 187 Mont. 276, 284, 609 P.2d 711, 716 (1980).

Plaintiffs suggest that the failure to publish the second notice did not impact the County's substantial compliance with the first zoning attempt. This Court disagrees. Plaintiffs cannot point to one Montana case where it is stated that failure to

provide a statutorily required notice can be forgiven. Indeed, in Wood v. City of Kalispell, 131 Mont. 390, 310 P.2d 1058 (1957), the issue was the attempted creation of a special improvement district. In that case, notice was sent to 424 property owners, but the City of Kalispell failed to send the required 425th notice. The supreme court noted that "nothing short of a strict compliance with all of these [notice] requirements will suffice." Wood, at 393, 310 P.2d at 1060. The court went on to note that failure to give the notice prescribed by statute in the attempted creation of an improvement district deprives the county of jurisdiction to proceed. Id. The court further noted that the failure to serve one owner or any number of owners was "not substantial compliance" with a mandatory statute. Wood, at 396, 310 P.2d at 1061 (emphasis added). Likewise, publishing three times when a statute says to publish four times cannot be felt to be "substantial compliance."

Another case which illustrates this concept is State ex rel. Stevens v. McLeisch, 59 Mont. 527, 198 P. 357 (1921). In that case, the county was to publish a notice one time a week for two weeks before a hearing. The county did publish two times, but one publication was three weeks before the hearing and the other was two weeks before the hearing. No publication occurred during the week before the hearing. The supreme court held that the county had no jurisdiction to proceed since it had failed to follow the statutorily required manner of providing notice. The court noted that publication of notice as set forth in statute is an essential prerequisite to jurisdiction on the part of a county board. Departure from its commands amounts to disregard of the legislative will. Without proper publication, the tribunal has no authority to proceed at all. Stevens, at 531, 198 P. at 359.

Therefore, this Court cannot accept, at this stage of the proceedings, Plaintiffs' contention that the BOCC substantially complied with the notice

requirements of Section 76-2-205, MCA. Therefore, it appears that the BOCC acted appropriately in deciding that by failing to publish all of the notices required, all of its proceedings in the first zoning attempt were void. Such being the case, this Court has no need to address the contention concerning the alleged inappropriate counting of the agricultural land protest issue.

Emergency Zoning

The Court noted above that notice of the December 12, 2006, hearing on the interim zoning regulations which are currently in effect was published on November 23 and December 3, 2006. Further, there is nothing in the record that would indicate that the notice published (Pl.'s Ex. 7) is lacking in any statutory requirement. The place and time of the hearing was set forth and the general nature of the regulations was mentioned. Further, persons were told that they could look at the County website to see the specific zoning ordinance or they could go to the County Planning Department to get a copy of it.

The first issue the Court must resolve is what procedure the interim zoning regulation adoption process must follow. Plaintiffs suggest that the procedure must follow Section 76-2-205, MCA, which is the procedure the BOCC followed leading up to its November 16, 2006, hearing. The BOCC, on the other hand, suggests that there would be no need for an interim zoning procedure as set forth in Section 76-2-206, MCA, if the BOCC were merely to do exactly the same as specified in Section 76-2-205, MCA.

In this regard, the Court must consider two cases. The first sprung from this very courtroom. See Bryant Dev. v. Dagel, 166 Mont. 252, 531 P.2d 1320 (1975). In that case, unbeknownst to anyone and without any prior notice whatsoever, the Lewis and Clark County Commissioners met in an evening emergency session and

adopted a temporary interim zoning resolution. The court held that the zoning resolution was "void for failure to the notice and hearing provisions set forth in section 16-4705, R.C.M. 1947 [now Section 76-2-205, MCA]." Bryant Dev., at 258, 531 P.2d 1324. A similar result was reached in Christian, Spring, Sielbach & Assocs. v. Miller, 169 Mont. 242, 545 P.2d 660 (1976). Again, the supreme court held that the commissioners' failure to comply with the notice and hearing provisions set forth in the predecessor to Section 76-2-205, MCA, rendered the interim zoning resolution invalid. Christian, Spring, at 245-46, 545 P.2d at 662.

Plaintiffs suggest that although the BOCC complied with the first publication and hearing provisions of Section 76-2-205, MCA, in enacting the interim zoning regulations, they failed to pass a resolution of intention and publish notice of the passage of resolution of intention and to provide for a protest period.

At this stage of the proceedings, the Court cannot agree with Plaintiffs' interpretation of the Bryant Dev. case. Both Bryant Dev. and Christian, Spring involved a total failure to hold a hearing and provide any notice. Here, the BOCC held a hearing and had published notice of what it was going to do on December 12, 2006. That met the requirements of the two cases just mentioned above. To require the BOCC to pass a resolution of intention and to create a protest period would create a ridiculous situation where there would be absolutely no reason to have a specific statutory requirement on emergency interim zoning. If the legislature was to require a county, in enacting interim zoning, to go through all the procedures set forth in Section 76-2-205, MCA, then why bother having a statutory provision on emergency zoning? What the supreme court was concerned with in Bryant Dev. was notice and hearing. Notice and hearing was given to the parties.

This Court's view on the interim versus permanent zoning procedure

was the same result reached by the court in Farley v. Big Horn County Mont., 2003 Mont. Dist. LEXIS 2464, ¶¶ 20, 21 (2003). While the Court realizes that another district court decision is no way binding on this Court, it is, in the view of this Court, persuasive.

Thus, we have a situation where the Plaintiffs knew the date and time of the hearing and they knew the precise nature of the zoning regulations to be offered. However, one troubling aspect remains. Plaintiffs, as noted earlier, frequently asked county officials what the nature of the emergency was. Keep in mind that pursuant to Section 76-2-206, MCA, a county commission may adopt interim zoning regulations if the purpose is to classify and regulate those uses and related matters that constitute the emergency. See Section 76-2-206(1)(a), MCA. Here, Plaintiffs and those sympathetic to them frequently requested the nature of the emergency and, at the hearing, requested that the record remain open so that they might respond to the report submitted by Moore. As noted above, Moore's report was not presented until the hearing began at 9:00 a.m. While it is true that her report appears to be a summarization of numerous documents of which all parties were aware, Plaintiffs certainly did not know that before 9:00 a.m. on December 12, 2006.

A troubling question has been presented to the Court. That question is, what was the purpose of Moore's report? If the BOCC were merely relying on the previous scientific reports, such as the TMDL report and the pharmaceutical report, why not just say that? It is clear to the Court that Moore was directed to prepare her report in order to support the interim zoning regulations. The Court finds no fault in that, nor is the Court in any position to in any way say that Moore's report does not support the interim zoning regulations. Indeed, Moore indicated that, after preparing her report, she was convinced an emergency situation existed.

The problem remains in the fact that participants at a public hearing should not have to guess what the government's justifications are for its actions. In other words, although Plaintiffs were well aware of the other reports that were widely available, they had no way of knowing prior to 9:00 a.m. on December 12 that those reports were what the BOCC would rely upon. The Court realizes the BOCC need not provide non-documentary information and it is not required to create documents that it does not have. However, it appears that the Plaintiffs should have been given an opportunity to counter the arguments made by Moore in her report. (Def.'s Ex. H.)

Involved here are Sections 8 and 9 of Article II of the Montana Constitution. They provide as follows:

> **Section 8.** The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.
>
> **Section 9. Right to know**. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

These provisions were discussed by the Montana Supreme Court in the case of Bryan v. Yellowstone County Sch. Dist. No. 2, 2002 MT 264, 312 Mont. 257, 60 P.3d 381. In that case, the school district in Billings elected to close three elementary schools. The decision was made upon a rating system. This rating system was not provided to the individuals who opposed the school closures. In declaring the school district action void, the supreme court noted:

> Certainly, as the District suggests, Bryan was given the opportunity to voice her concern regarding the school closure recommendation. However, she participated under a distorted perspective in light of the District's partial disclosure of information. . . .
>
> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies

> that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

Bryan, ¶¶ 45-46, citing Morgan v. United States, 304 U.S. 1, 18-19, 58 S. Ct. 773, 776, 82 L. Ed. 1129, 58 S. Ct. 999 (1938).

Thus, although the Plaintiffs here knew well the nature of the proposed regulations and the problem sought to be addressed, they did not know the BOCC's justification to classify the groundwater situation in the Helena valley as an emergency. They were certainly entitled to know why the situation was an emergency and be provided reasonable opportunity to present evidence that they might be able to accumulate which would suggest that an emergency did not exist. While the Court can speculate that the Plaintiffs might only present the same information they had been presenting to the BOCC for the last several months, we are here talking about a constitutional right which this Court should liberally construe. Thus, since Plaintiffs were not given an opportunity to contest the existence of an emergency and to contest the County's documents that supported that conclusion (Ex. H), the Court must find that the Plaintiffs' right to participate in the operation of government as guaranteed by Section 8 of Article II of the Montana Constitution was likely violated.

The question then becomes, what is the appropriate remedy? The Court realizes that it is in no position to decide whether an emergency exists. The Court will accept the assertions by the BOCC and Moore that an emergency does exist. Certainly, this impacts the welfare of all individuals who live in the affected zoning area.

Theoretically Plaintiffs' loss in a case such as this is one that could be compensated by money damages. However, the Court does not see how its declaration that the Plaintiffs' loss of the right to participate in the December 12, 2006, hearing

was violated can be compensated by money. This is not unlike the situation in Bryan, where the supreme court struggled with the issue of a proper remedy in the face of a likely constitutional violation. In Bryan, the court held:

> To simply to declare a constitutional violation and yet allow the decision to stand would set a regrettable precedent. In the future, we presume that the prospect of negligible consequences would invoke concomitantly negligible deterrents. Here, we are simply not prepared to sacrifice Bryan's constitutionally prescribed right to know and participate for the sake of convenience. . . . While the circumstances of this case compel an unfortunate result, the vigilant protection of one's constitutional rights warrants such a disposition.

Bryan, ¶¶ 52-53.

The Court also notes that it is making no decision whatsoever on whether the present groundwater situation in the valley constitutes and emergency, or whether Moore's report adequately presents evidence of emergency so as to support the BOCC's procedure. These are matters for determination by the BOCC. Indeed, the BOCC may proceed anew with another notice and hearing, and arrive at the same result. Since that is likely to occur in a short period of time, the danger to the public would be short lived since these regulations could be reimplemented quickly.

Therefore, the Court hereby issues a preliminary injunction against the interim zoning regulations adopted by the BOCC on December 12, 2006. This order shall, in no way, forbid the BOCC from reinstituting the same zoning regulations. However, Plaintiffs must be given the opportunity to present evidence that no emergency exists. This Court makes no determination as to what decision the BOCC should reach should it proceed to readopt the interim zoning regulations.

This preliminary injunction shall continue until the trial of this matter or until Lewis and Clark County enacts new interim zoning regulations after providing a

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hearing and providing opponents of said interim zoning the opportunity to counter the determination of emergency made by the BOCC.

DATED this 19 day of March, 2007.

JEFFREY M. SHERLOCK
District Court Judge

pcs: W. A. (Bill) Gallagher
K. Paul Stahl/Tara Harris

T/JMS/fasbender v l&c county fco.wpd